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No. 80-584

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CATHERINE WALSH, WIDOW OF RUSSELL A. MIERL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HER MINOR CHILD, EDITH MIERL, ET ALS.,
Petitioner,

versus

LOUISIANA HIGH SCHOOL ATHLETIC ASSOCIATION AND LUTHERAN HIGH SCHOOL ASSOCIATION OF GREATER NEW ORLEANS,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION TO THE PETITION

TALLEY, ANTHONY, HUGHES
& KNIGHT
CHARLES M. HUGHES
ATTORNEY OF RECORD
322 Columbia Street
Bogalusa, Louisiana 70427
(504) 732-7151

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53086, N. O., LA. 70153 - 504/822-1611

QUESTIONS PRESENTED

Respondents respectfully submit to the Court that, in addition to those questions listed by petitioners, the petition for certiorari in this case also raises the following questions:

1. Was the petition for a writ of certiorari filed untimely?
2. Is the privilege of participating in interscholastic athletics and in particular a student's interest in participating in a single year of interscholastic athletics an interest that is protected by the due process clause of the Fourteenth Amendment?

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No. 80-584

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

CATHERINE WALSH, widow of Russell A. Mierl,
Individually and as Administratrix of the
Estate of her minor child,
EDITH MIERL, et als.,
Petitioner,

versus

LOUISIANA HIGH SCHOOL ATHLETIC
ASSOCIATION AND LUTHERAN HIGH SCHOOL
ASSOCIATION OF GREATER NEW ORLEANS,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION TO THE PETITION

MAY IT PLEASE THE COURT:

Defendant-respondent, Louisiana High School Athletic Association, submits this brief in opposition to

the plaintiffs-applicants' petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit and respectfully submits that the writ should be denied for the reasons set forth below. This brief in opposition is submitted in accordance with the Court's request that a response be filed in this case on or before January 3, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Walsh v. Louisiana High School Athletic Association*, 616 F.2d 152 (5th Cir. 1980). The opinion of the District Court is reported as *Walsh v. Louisiana High School Athletic Association*, 428 F.Supp. 1261 (E.D. La. 1977).

JURISDICTION

Contrary to the statement of jurisdiction in plaintiffs' petition for a writ of certiorari, the judgment of the United States Court of Appeals was entered on April 30, 1980 and not on July 7, 1980 as stated in the petition for certiorari. Plaintiffs-petitioners' petition for rehearing and rehearing *en banc* was denied by order of the United States Court of Appeals for the Fifth Circuit on June 23, 1980. The petition for certiorari in this case was filed more than ninety days after the denial of the petition for rehearing and is therefore untimely. Accordingly, this Court is without jurisdiction to con-

sider said petition. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provision cited by plaintiffs in their petition for certiorari, respondent does cite to the Court the following statutory provision:

> "Any other appeal or writ of certiorari intended to bring any judgment or decree in any civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days." 28 U.S.C. §1201(c).

STATEMENT OF THE CASE

Plaintiffs originally brought this suit for a declaratory judgment in the United States District Court for the Eastern District of Louisiana to challenge on constitutional grounds the application of the defendant's "transfer rule" to their children. The defendant, Louisiana High School Athletic Association (hereinafter LHSAA) is a voluntary Association of public,

private and parochial high schools within the State of Louisiana. The purpose of the LHSAA is to promote, regulate and direct the interscholastic athletic activities of its member schools and, in order to accomplish said purpose, the Association makes the rules governing competitive athletic activity between its members. One of the most serious problems facing the LHSAA is the illegal recruiting of promising young athletes as they matriculate from elementary school or junior high school into high school. The LHSAA is a member of the National Federation of State High School Associations, which is a national organization that has recognized the evils of recruiting promising young athletes to attend high school solely for the purpose of participating in athletics. The fact that this type of recruitment is an evil which the Association has a right to prevent was recognized by the plaintiff at trial and was recognized by both the District Court and the Court of Appeals. Plaintiffs, however, challenged the Association's method of deterring recruitment as applied to their children and not the Association's right to try to prevent it.

The Association's primary deterrent to recruitment is the "transfer rule". This rule assigns geographical home districts to each of its member high schools. If a student transfers to a high school outside of his geographical area, then he is ineligible under the rule to participate in interscholastic athletic competition for a period of one year. The plaintiffs' minor children elected to attend Lutheran High School, a school outside of

their home geographical district and outside of the geographical district of elementary schools which they attended. One of the bases of plaintiffs' claim that the rule is unconstitutional is that, since Lutheran High School is a religious school, to apply the rule to them infringes upon their right to the free exercise of religion.

It should be noted here that the rule does not prevent anyone from practicing the Lutheran faith. It does not prevent anyone from attending Lutheran High School. It does not prevent anyone from attending Lutheran High School and studying religion or any other subject including athletics. Under this rule, the students may take athletics at Lutheran High School and may participate in practices with the varsity athletic teams. The rule simply prevents the students who transfer out of their home district from participating in athletic contests between Lutheran High School and other high schools for a period of one year. At the end of this one-year period, these students who have transferred to Lutheran High School may participate in interscholastic athletic competition. In addition to their freedom of religion claim, plaintiffs claim a denial of due process and equal protection. The Trial Judge rendered a written opinion wherein he rejected plaintiffs' freedom of religion claim. He also rejected their claim that the rule denied them both substantive and procedural due process of law. The District Court also held that the transfer rule as generally applied throughout Louisiana did not violate the equal protection clause of the Fourteenth Amendment. However,

because of what the Court deemed to be certain exceptions to the rule allowed in Orleans Parish, it held that plaintiffs who lived in Orleans Parish were denied equal protection of the law and declared the transfer rule as applied in Orleans Parish unconstitutional.

This latter fact is important because some of the plaintiffs to this declaratory action were residents of Jefferson Parish. As to the plaintiffs who were residents of Jefferson Parish, the Trial Court did not grant any relief, and they did not appeal its decision. Therefore, as to those plaintiffs, the decision of the Trial Court is final.

Defendant, LHSAA, appealed the Trial Court's decision that its rule as applied in Orleans Parish was unconstitutional. The Fifth Circuit's opinion in this case affirms the Trial Judge's decision that the application of the rule to plaintiffs was not a denial of the right to freedom of religion or the right to substantive or procedural due process of law. The Fifth Circuit also affirmed the decision that the rule as generally applied did not violate equal protection of the law and reversed the Trial Court's decision that, as applied in Orleans Parish, the rule was a denial of equal protection.

REASONS FOR NOT GRANTING WRIT

Respondent submits this is not a proper case for granting a writ of certiorari for the following reasons:

1. The petition for a writ of certiorari was filed untimely and therefore this Court is without jurisdiction to grant the writ.

2. The decision of the Court of Appeals (except on the issue of the existence of federal jurisdiction) is correct on the merits.

3. The decision of the Court of Appeal is not in conflict with any applicable decision of this Court and is in fact in accord with all applicable decisions of this Court.

4. The decision is in accord with the decisions of other Federal Courts of Appeal on the same subject matter.

5. The decision of the Court of Appeal is in accord with a decision of the Louisiana Supreme Court (the State Court of last resort) on the same subject matter.

ARGUMENT IN OPPOSITION TO GRANTING WRITS

The petition for a writ of certiorari was filed untimely. The opinion of the Court of Appeals for the Fifth Circuit was handed down on April 30, 1980 and judgment was entered the same day. Plaintiffs timely filed a petition for rehearing and rehearing *en banc*. Rehearing was denied on June 23, 1980. Under the provisions of 28 U.S.C. §1201(c) plaintiffs had ninety days from June 23, 1980 in which to petition this Honorable

Court for a writ of certiorari. Therefore, the last day for plaintiffs to petition this Court for a writ of certiorari was September 21, 1980. The petition for a writ of certiorari was filed on October 6, 1980. There is no contention in this case that an extension was sought or granted. To the contrary, plaintiffs contend that their application was filed timely based upon the assertion in their petition for writs that judgment was entered by the Court of Appeals on July 7, 1980. The author of this brief has no knowledge of any facts upon which such a contention can be made. In fact, undersigned counsel has checked with the clerk's office of the Fifth Circuit Court of Appeals and has been informed that the minutes of the docket of that Court show that no action was taken in this matter on July 7, 1980. He has also been informed that the date of entry of judgment in this matter was April 30, 1980. Rule 36 of the Federal Rules of Appellate Procedure would require that the date of entry of judgment in this case be April 30, 1980. The undersigned counsel obtained from the clerk's office of the United States Court of Appeals certified copies of the judgment dated April 30, 1980 and the order denying the petition for rehearing dated June 23, 1980, which certified copies are reprinted as an appendix to this brief.

Since the petition for a writ of certiorari in this case was filed untimely, this Court is without jurisdiction to consider said petition. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418, 67 L.Ed. 719, 43 S.Ct. 458 (1923); *Federal Trade Commission v. Minneapolis-Honeywell Regulator*

Company, 344 U.S. 206, 97 L.Ed. 245, 73 S.Ct. 245 (1952); *Matton Steamboat Co., Inc. v. Murphy*, 319 U.S. 412, 87 L.Ed. 1483, 63 S.Ct. 1126 (1943); *Department of Banking v. Pink*, 317 U.S. 264, 87 L.Ed. 254, 63 S.Ct. 233 (1942); *Citizens' Bank v. Opperman*, 249 U.S. 448, 63 L.Ed. 701, 39 S.Ct. 330 (1919); *See also*, Justice Harlan's concurring opinion in *Schacht v. United States*, 398 U.S. 58, 26 L.Ed.2d 44, 90 S.Ct. 1555 (1970).

It is also respectfully submitted that the writs should be denied in this case because of a lack of federal question jurisdiction. As recognized by the Court of Appeal in its decision, there remains some interests that are outside the scope of constitutional protection. *Walsh v. Louisiana High School Athletic Association*, 616 F.2d 152, 159 (1980). It has been consistently held that suits by student athletes challenging high school athletic association rules or NCAA rules do not present substantial federal question. *Wiley v. National Collegiate Athletic Association*, 612 F.2d 473 (1979) cert. denied ____ U.S. ____, ____ S.Ct. ____, 64 L.Ed.2d 798 (1980); and cases cited therein.

The writ in this case should also be denied because the decision of the Court of Appeals is in accord with the applicable decisions of this Court. On the issue of freedom of religion, petitioners cite *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) as authority for granting the writ and reversing the decision of the Fifth Circuit. However, both the District Court and the Court of Appeals relied upon *Yoder* to re-

ject plaintiffs' freedom of religion claim. Both courts correctly applied the test laid down in *Yoder* for determining whether or not a statute or regulation is invalid as an infringement on the free exercise of religion.

The Court of Appeals also followed the applicable decisions of this Court on the due process and equal protection issues. *See, Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978); *Paraham v. Hughes,* 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979) and other cases on these issues cited at 616 F.2d 159-160.

In addition, the writ should be denied in this case because the decision of the Court of Appeals for the Fifth Circuit is in accord with the decisions of other federal courts of appeals on the same subject matter. *Wiley v. National Collegiate Athletic Association,* 612 F.2d 473 (10th Cir. 1979) cert. denied ____ U.S. ____, ____ S.Ct. ____, 64 L.Ed.2d 798 (1980); *Moreland v. Western Pennsylvania Interscholastic Athletic League,* 572 F.2d 128 (3rd Cir. 1978); *Dennis J. O'Connel High School v. Virginia High School League,* 581 F.2d 81 (4th Cir. 1978); *Hamilton v. Tennessee Secondary Athletic Association,* 552 F.2d 681 (6th Cir. 1976); *Albach v. Odle,* 531 F.2d 983 (10th Cir. 1976); and *Oklahoma High School Athletic Association v. Bray,* 321 F.2d 269 (10th Cir. 1963).

The decision of the Court of Appeals in this case is in accord with previous decisions by the Fifth Circuit on

the validity of rules regulating high school and collegiate athletics. *Mitchell v. Louisiana High School Athletic Association*, 430 F.2d 1155 (5th Cir. 1970); *Parish v. The National Collegiate Athletic Association*, 506 F.2d 1028 (5th Cir. 1975).

The decision of the Court of Appeals in this case is also in accord with the decision of the Louisiana Supreme Court (the state court of last resort) on the same subject matter. *Chabert v. Louisiana High School Athletic Association*, 323 So.2d 774 (1975).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in this case should be denied or dismissed as being untimely. In the alternative, it is respectfully submitted that the petition for a writ of certiorari should be dismissed because this case does not present the Court with federal question jurisdiction, and in the further alternative, it is respectfully submitted that the writ should be denied because the decision below is correct and in accord with the applicable decisions of this Honorable Court and the decisions of the other courts of appeals.

Respectfully submitted:

Charles M. Hughes
TALIEY, ANTHONY, HUGHES
& KNIGHT

322 Columbia Street
Bogalusa, Louisiana 70427
(504) 732-7151
ATTORNEY OF RECORD FOR
DEFENDANT-RESPONDENT
LOUISIANA HIGH SCHOOL
ATHLETIC ASSOCIATION

CERTIFICATE

I hereby certify that three copies of the foregoing Brief have this day been delivered to Mr. Edmund T. Wegener, Jr., Attorney at Law, 135 St. Charles Avenue, Suite 1006, New Orleans, Louisiana 70130, and Mr. Thomas Giraud, Attorney at Law, 610 Poydras Avenue, New Orleans, Louisiana 70130 by placing copies of same in the U.S. Mail, postage prepaid.

Bogalusa, Louisiana, this ____ day of December, 1980.

Charles M. Hughes

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1792

CATHERINE WALSH, ETC., ET AL.,
Plaintiffs-Appellees,

versus

LOUISIANA HIGH SCHOOL ATHLETIC ASSOCIATION,
Defendant-Appellant,

LUTHERAN HIGH SCHOOL ASSOCIATION OF GREATER NEW ORLEANS,
Defendant.

Appeal from the United States District Court for the Eastern District of Louisiana

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I, Gilbert F. Ganucheau, Clerk of the U.S. Court of Appeals for the Fifth Circuit, do hereby certify that the attached pages numbered from 1 to 2 contain a full, true and complete copy of the following documents:

1. Judgment dated April 30, 1980

2. Order denying Petition for Rehearing, June 23, 1980

In the above case in this Court as full, true and complete as the originals of the same now remain in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this date:

GILBERT F. GANUCHEAU,
Clerk of the United States Court
of Appeals for the Fifth Circuit.

/s/ Mary S. Stram
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1792

CATHERINE WALSH, ETC., ET. AL.,
Plaintiffs-Appellees,

versus CA-75-2458 "C"

LOUISIANA HIGH SCHOOL ATHLETIC ASSOCIATION,
Defendant-Appellant,

LUTHERAN HIGH SCHOOL ASSOCIATION OF GREATER NEW ORLEANS,
Defendant.

Appeal from the United States District Court for the Eastern District of Louisiana

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Before CHARLES CLARK, RONEY and HENDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for

the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

IT IS FURTHER ORDERED that plaintiffs-appellees pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

April 30, 1980

ISSUED AS MANDATE: July 1, 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1792

CATHERINE WALSH, ETC., ET. AL.,
Plaintiffs-Appellees,

versus

LOUISIANA HIGH SCHOOL ATHLETIC ASSOCIATION,
Defendant-Appellant,

LUTHERAN HIGH SCHOOL ASSOCIATION OF GREATER NEW ORLEANS,
Defendant.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

(Opinion 4/30/80, 5 Cir., 197__, ____ F.2d ____).

(June 23, 1980)

Before CHARLES CLARK, RONEY and HENDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Charles Clark
United States Circuit Judge